Filed 4/8/19 In re K.H. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re K.H., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. H.H. et al., Defendants and Appellants.	E071627 (Super.Ct.No. RIJ112299) OPINION

APPEAL from the Superior Court of Riverside County. Walter H. Kubelun, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Tracy De Soto, under appointment by the Court of Appeal, for Defendant and Appellant H.H.

Elena S. Min, under appointment by the Court of Appeal, for Defendant and Appellant E.H.

Gregory P. Priamos, County Counsel, James E. Brown, Guy B. Pittman and Prabhath Shettigar, Deputy County Counsel, for Plaintiff and Respondent.

In this dependency case, E.H. (Mother) and H.H. (Father), parents of K.H., were denied reunification services because of their failure to reunify with their other children. The juvenile court terminated their parental rights and freed K.H. for adoption. Mother appeals from the court's order denying her petition requesting reunification services. (Welf. & Inst. Code, § 388.)[1] Both parents appeal from the court's order terminating their parental rights. (§ 366.26.) We affirm.

BACKGROUND

I. *The Family's Dependency History*

The parents have a dependency history dating back to 2006 involving K.H.'s four older brothers. Although K.H.'s siblings are not subjects of this appeal, we provide a brief summary of their dependency history for background purposes.

In 2006, the juvenile court took jurisdiction over two of K.H.'s siblings because of domestic violence between the parents and substance abuse by Mother. Both parents received reunification services. The dependency case terminated in 2007 with Father getting sole legal and physical custody, while Mother got supervised visits. In 2007, the court took jurisdiction over a third brother when Father left the child on the maternal grandmother's doorstep. In 2009, that dependency case also terminated with Father

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[1] Further undesignated statutory references are to the Welfare and Institutions Code unless otherwise indicated.

getting sole legal and physical custody. In 2013, all three children again came under the court's jurisdiction because of ongoing domestic violence between the parents and Father's inability to provide for the needs of the children. The court later took jurisdiction over a fourth brother on the basis of the open dependency case involving the three older children. The court removed all four children from Father's care and ordered reunification services for both parents. In August 2016, the court returned the four children to Father with family maintenance services. It had earlier terminated Mother's reunification services. Less than two months after Father regained custody, the family was back in court on a supplemental petition. (§ 387.) Another instance of domestic violence had occurred between the parents in September 2016.[2] The court removed the four children from Father and denied him reunification services. In May 2017, the court selected legal guardianship with the foster mother as the permanent plan for three of the children. The fourth child was living in the same foster home, but the court ordered a planned permanent living arrangement for that child.

K.H. was born in April 2016, when the parents had the open dependency case involving his four siblings. Riverside County Department of Public Social Services (DPSS) spoke to Mother by phone in October 2016, but she "declined to provide any information regarding" K.H.'s whereabouts. In February 2017, DPSS received a referral alleging that the parents were unable to provide for K.H. because of mental health and

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[2] The detention report states that the domestic violence occurred in September 2017, but the 2017 date appears to be a typographical error.

substance abuse issues. It discovered that Mother was incarcerated. The parents reportedly refused "to provide the whereabouts of [K.H.] per a court order." Father apparently had contact with K.H., but a family friend was caring for the child. The investigation was closed as "[i]nconclusive." (Boldface omitted.)

II. *K.H.'s Detention*

In November 2017, DPSS took K.H. into protective custody after it investigated a referral alleging general neglect and caretaker absence. K.H. was approximately 19 months old at the time. At this point, Mother had been incarcerated for a year and had left K.H. with a neighbor. The neighbor took him to Father, who had been paying another neighbor to care for K.H. for the past five months. Father had suffered a stroke in March 2017 and was unable to care for K.H. He would visit K.H. every other Sunday. The most recent Sunday, however, the neighbor had returned K.H. to Father's care. Father could not afford to pay the neighbor anymore. Father took K.H. to an urgent care facility to surrender him to DPSS. DPSS placed him in the foster home with his four siblings.

Father had no criminal history, but Mother's history included felony domestic violence convictions in September 2016 (Pen. Code, § 273.5, subd. (f)(1)) and July 2007 (Pen. Code, § 273.5, subd. (a)), and misdemeanor domestic violence convictions in July 2016 (Pen. Code, § 243, subd. (e)(1)) and June 2006 (Pen. Code 273.5, subd. (a)). She also had misdemeanor convictions for violating domestic violence restraining orders in July 2016, August 2009, July 2007, and May 2007. (Pen. Code, § 273.6, subd. (a).)

After investigating the November 2017 referral, DPSS filed a petition under section 300 alleging that K.H. was at substantial risk of serious physical harm as a result of the parents' failure to adequately supervise or protect him (§ 300, subd. (b)(1)), and that the parents had left him without any provision for support (§ 300, subd. (g)). The court detained K.H. from the parents.

III. *Jurisdiction and Disposition Proceedings*

In preparation for the jurisdiction and disposition hearings, the social worker interviewed Mother via telephone, as she was still in custody at the time. Mother reported that she was drinking and smoking marijuana before her incarceration, but she was subsequently sober and planned to remain so after her release. While in custody, she had completed a substance abuse treatment program, parenting classes, and an 18-hour workshop in nonviolent conflict resolution. Mother said that she had realized fighting with Father was not the way to resolve their issues.

K.H.'s foster mother reported that he was doing well in her home, and she had no concerns. He primarily spoke Spanish when he was placed with her, but he was learning some English words.

Mother was released from custody on December 21, 2017. She was living with Father, and the two had resumed their relationship.

The court held the jurisdiction hearing on January 11, 2018. It found the allegations of the petition to be true with one minor modification.[3] It ordered a minimum of two supervised visits each week for Mother.

Between the jurisdiction and disposition hearings, Mother visited K.H. consistently. The parents had presented DPSS with a "no negative contact" restraining order, and DPSS had decided that they could visit K.H. together. Mother engaged well with K.H., and he seemed to enjoy the visits. While he initially did not seem to know Mother, he had grown comfortable with her. The parents noticed that he particularly enjoyed one toy at the DPSS office and purchased a similar toy for him. Mother brought snacks for him, but DPSS expressed concern that she let K.H. overeat and become uncomfortable. As to services, Mother said that she intended to take more parenting and anger management classes and would attend Alcoholics Anonymous meetings.

K.H. continued to do well in his placement with his four siblings. The social worker described him as "consistently happy and healthy." The foster mother was willing to provide him with permanency.

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[3] The sustained allegations under section 300, subdivision (b), stated that (1) Father had surrendered K.H. to DPSS because he was unable and unwilling to care for the child; (2) the parents had an extensive dependency history involving their other children and had failed to reunify with them; and (3) Mother had an extensive criminal history, including numerous arrests and/or convictions for domestic violence against Father. The sustained allegations under section 300, subdivision (g), stated that (1) Mother was unable to provide K.H. with care and support, and (2) Father was unable and/or unwilling to provide K.H. with care and support.

Mother testified at the disposition hearing on February 8, 2018. The substance abuse treatment that she completed in custody was a six-month program. The program included group and individual counseling and random drug testing. Mother learned how to be a better parent in her parenting classes, and in her domestic violence workshop she learned how to get along with her peers and "take a breather" when she got angry. During visits with K.H., she gave him snacks and played with him, and she was helping him learn to identify colors. Mother realized that she had a dependency history with her other children, but she felt that she had rehabilitated and that her attitude had changed.

The court adjudged K.H. a dependent of the court and denied reunification services for the parents under section 361.5, subdivisions (b)(10) and (c)(2) (failure to reunify with the child's siblings).[4] The court commended Mother for the services she had completed while she was in custody. It reasoned, however, that she had only "been back in society" for six weeks, and it was too soon to say whether she had truly learned and changed. The court ordered K.H. removed from the parents and found his current

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[4] Section 361.5, subdivision (b)(10), permits the court to deny reunification services "when the court finds, by clear and convincing evidence," that "the court ordered termination of reunification services for any siblings or half siblings of the child because the parent or guardian failed to reunify with the sibling or half sibling after the sibling or half sibling had been removed from that parent or guardian pursuant to Section 361 and that parent or guardian is the same parent or guardian described in subdivision (a) and that, according to the findings of the court, this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from that parent or guardian." Subdivision (c)(2) states that the court "shall not order reunification for a parent or guardian" described by subdivision (b)(10) unless it finds, "by clear and convincing evidence, that reunification is in the best interest of the child."

placement appropriate. The prior order for twice weekly visits with Mother remained in force. The court scheduled a hearing to select and implement a permanent plan (section 366.26 hearing) for June 2018.

IV. *Review Period*

The court continued the section 366.26 hearing and, in the interim, held a review hearing in August 2018. In advance of that hearing, DPSS reported that Mother was consistently visiting K.H. The visits continued to go well, and K.H. appeared happy to see her. But DPSS expressed concern that K.H. was overeating at visits and vomiting afterward. The issue was addressed at a meeting with the parents.

The social worker felt that Mother lacked insight into the reasons for her dependency history and the decisions of the court. Mother told the social worker that she did not understand why the court had not returned K.H. to her care. She said that she was incarcerated and "had no involvement with [K.H.] being removed from Father." She submitted a certificate of completion for a 10-session cooperative parenting program.

K.H. was reportedly loving, happy, thriving, and very bonded to his siblings. The foster mother, who was already the legal guardian of three of his siblings, wanted to adopt him.

V. *Mother's Section 388 Petition*

On September 25, 2018, Mother filed a petition under section 388 requesting that reunification services be granted to her. Mother asserted that, since her release from custody, she had complied with her probation terms, drug tested consistently, found a job,

and completed the additional parenting class. She filed a letter from her probation officer confirming that she had complied with her probation terms since her release and stating that she had submitted to six urinalysis tests. She also filed exhibits showing that she had completed another anger management class and had just attended her first weekly counseling session. Mother requested that the court grant her six months of reunification services and transition K.H. back into her care. The court set the petition for a hearing on the same date as the section 366.26 hearing.

VI. *Section 388 and Section 366.26 Proceedings*

In the section 366.26 report, DPSS explained that Mother had continued to regularly visit K.H. The visits were "overall . . . adequate," but Mother did not discipline K.H. appropriately. If he whined or threw a tantrum, she gave in to him.

K.H. was bonded to the foster mother and his siblings. The fourth sibling, for whom the foster mother was not the legal guardian, was in a therapeutic foster care program and was scheduled to return to the foster mother's home in February 2019. The foster mother loved K.H. and was committed to adopting him.

DPSS also filed a report in response to Mother's section 388 petition. The social worker twice called the provider of Mother's parenting and anger management classes, but did not receive a return call. There were no new reports of domestic violence since Mother's release from custody. Mother's probation officer reported that she had recently submitted to her seventh urinalysis test, and she was still complying with her probation terms. The foster mother reported that the parents had called their sixteen-year-old child

to ask what they should do when K.H. had a tantrum during visits. Father also asked the child to speak with Mother "about her not coming home at nights." The parents had recently missed four visits with K.H. without calling to cancel ahead of time.

The combined hearing on Mother's petition and K.H.'s permanent plan occurred on October 31, 2018. Mother testified that her additional parenting class was helpful in that she learned how to be a "patient, happy parent." She learned to redirect K.H. at times, like when he was trying to pick things off the floor and put them in his mouth; she would tell him to throw the things away. K.H. called her "mommy" when they visited. She felt that they had a loving, caring relationship and that he was bonded to her. He cried when visits ended. The additional anger management class that she had completed since her release was 16 sessions. The counseling that she had started was individual, but the therapist said that she could bring Father, so she had been doing that. Her drug tests for probation had been negative so far. She had a part-time job. Father testified that he and Mother had not fought, yelled at each other, or struck each other since she started living with him after her release.

The court denied Mother's section 388 petition. It acknowledged that, since the disposition hearing, Mother had participated in parenting classes, anger management classes, and counseling. But the court reasoned: "The challenge the Court has is, as pointed out by minor's counsel and [DPSS], the parents have been in the system for over a decade commencing in 2006. They were offered services multiple times and what I have here is a ten-month period or so where the parents have engaged in services and are

making progress. But I have to balance that over the previous 10 or 12 years of not participating in services or completing services to the extent that children could be placed in their care. [¶] Unfortunately, while looking at the law and applying this factual situation, I see that the parents are changing, but there is not a complete change in circumstances." The court further found that it would disturb K.H.'s stability to grant Mother reunification services, so it was not in his best interests to grant the petition. K.H. had been living with the foster mother and his siblings for approximately one year, and he had bonded with all of them.

Regarding the selection of a permanent plan, Mother requested that the court select legal guardianship and not terminate parental rights pursuant to the parental bond exception. The court denied Mother's request. It found that Mother had visited K.H. twice a week consistently and had a bond with him, but K.H. saw his foster mother as the parental figure who takes care of him on a daily basis. The benefit derived from Mother's bond with K.H. did not outweigh the benefit he would gain from the permanency and stability that he could have with adoption by his foster mother. The court found that adoption was in K.H.'s best interests and terminated Mother's and Father's parental rights.

DISCUSSION

I. *Denial of Mother's Section 388 Petition*

Mother contends that the court abused its discretion by denying her section 388 petition because she established that circumstances had changed and that reunification services would be in K.H.'s best interests. We disagree.

Section 388 permits a parent of a dependent child to petition for a hearing to change, modify, or set aside any previous court order. (§ 388, subd. (a)(1).) The parent bears the burden of showing a "change of circumstances and that modification of the prior order would be in the best interests of the minor child." (*In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223.)

The change in circumstances supporting a section 388 petition "must be substantial." (*In re Ernesto R.*, *supra*, 230 Cal.App.4th at p. 223.) Moreover, after reunification efforts have terminated and the court has set the matter for a section 366.26 hearing, the focus of the case has shifted from the parents' interest in the care, custody, and companionship of the child to the needs of the child for permanency and stability. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re J.C.* (2014) 226 Cal.App.4th 503, 527.) At this point, the child's "best interests are not to further delay permanency and stability in favor of rewarding" the parent for his or her "hard work and efforts to reunify." (*In re J.C.*, *supra*, at p. 527.)

"Whether the juvenile court should modify a previously made order rests within its discretion, and its determination may not be disturbed unless there has been a clear abuse

of discretion." (*In re J.C., supra*, 226 Cal.App.4th at p. 525.) "'When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.'" (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 272.)

The juvenile court did not abuse its discretion in this case. The court reasonably concluded that granting Mother reunification services would not promote K.H.'s best interests. At the time of the section 388 hearing, K.H. had been living with the foster mother and his siblings for nearly one year. This was a significant portion of his young life, and he was bonded to the foster mother and his siblings. The foster mother was committed to providing a permanent home for K.H. At this stage of the proceedings, K.H.'s need for permanency and stability were paramount. Mother's evidence did not establish that K.H.'s "best interests in *permanency and stability* would be furthered by the proposed modification." (*In re J.C., supra*, 226 Cal.App.4th at p. 526.)

In arguing that her proposed change promoted K.H.'s best interests, Mother relies on the factors set forth in *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532 (*Kimberly F.*). *Kimberly F.* identified a nonexhaustive list of factors for evaluating a child's best interests under section 388, including: "(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*Ibid.*) But in a more recent case, the same court that

decided *Kimberly F.* declined to apply those factors and expressed skepticism about the soundness of *Kimberly F.*'s approach. (*In re J.C.*, *supra*, 226 Cal.App.4th at p. 527.) The court reasoned that the *Kimberly F.* factors failed to account for our Supreme Court's directive that the focus shifts to the dependent child's need for permanency and stability, once the court has terminated reunification services (or, as in this case, ordered no reunification services at disposition). (*In re J.C.*, at p. 527.) "As stated by one treatise, 'In such circumstances, the approach of the court in the case of . . . Kimberly F. . . . may not be appropriate since it fails to give full consideration to this shift in focus.'" (*Ibid.*, quoting Seiser & Kumli, Cal. Juvenile Courts Practice and Procedure (2014) § 2.140[5], p. 2-473.) We find Mother's argument, which similarly fails to consider the shift in focus, unpersuasive. In sum, the court did not abuse its discretion by denying her section 388 petition.

II. *Termination of Parental Rights*

Mother argues that the court erred by terminating parental rights because the parental bond exception applied. Father joins in Mother's argument and contends that if we reverse the order terminating her parental rights, then the reversal should apply to him as well. We find no error.

When the juvenile court finds that a dependent child is likely to be adopted, it must terminate parental rights and select adoption as the permanent plan unless it finds that termination would be detrimental to the child under one of several exceptions. (§ 366.26, subd. (c)(1); *In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.) "[I]t is only in an

extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

The parental bond exception applies if the court "finds a compelling reason for determining that termination would be detrimental to the child" because (1) the parent has "maintained regular visitation and contact with the child," and (2) "the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) The court's finding on the existence of the beneficial parental relationship is a factual matter that we review for substantial evidence. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314.) Whether "the relationship is a 'compelling reason' for finding detriment to the child is … a 'quintessentially' discretionary decision" that we review for abuse of discretion. (*Id.* at p. 1315.)

The parent bears the burden of showing the parental bond exception applies. (*In re S.B.* (2008) 164 Cal.App.4th 289, 297.) The parent must establish "that his or her relationship with the child '"'promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.'"'" (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 646.) "[T]he court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for

adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn* H. (1994) 27 Cal.App.4th 567, 575.)

Courts should examine the exception on a case-by-case basis and consider the variables affecting the parent-child bond, including "[t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) "[A] *parental* relationship is necessary for the exception to apply, not merely a friendly or familiar one." (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.) "Evidence of 'frequent and loving contact'" does not necessarily establish the applicability of the exception. (*In re Bailey J.*, *supra*, 189 Cal.App.4th at p. 1315; see also *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1419 ["It does not follow that since the girls have a loving and happy relationship with mother and father, . . . the juvenile court should have determined the statutory exception to termination of parental rights applied."].) "The juvenile court may reject the parent's claim simply by finding that the relationship maintained during visitation does not benefit the child significantly enough to outweigh the strong preference for adoption." (*In re Jasmine D.*, at p. 1350.)

Here, the court did just that—it found that Mother had visited K.H. regularly and shared a bond with him, but the bond did not outweigh the permanency and stability that he would gain in the adoptive home. Substantial evidence supported that determination, and the court properly concluded that Mother's relationship was not a compelling reason

for finding termination would be detrimental to K.H. K.H. was born in April 2016, and Mother suffered the felony domestic violence conviction in September 2016. Thus, he was over two years old and had spent only the first few months of his life in Mother's custody before she was incarcerated. Although their twice weekly visits were generally positive, Mother never progressed beyond the supervised visits, whereas the foster mother had tended to all of his needs on a daily basis for the last year. She, rather than Mother, occupied a parental role in K.H.'s life.

Mother argues that K.H. enjoyed their visits, called her "mommy," and cried at the end of visits. She also contends that she asserted her parental role by bringing him snacks, noting his interest in a toy and purchasing it for him, instructing him not to put objects in his mouth, and instructing him to put trash in the trash can. But this evidence did not establish that her bond with K.H. was so strong that termination of her parental rights would deprive him of a substantial, positive emotional attachment and would greatly harm him. And as much as Mother interacted with K.H. positively in these respects, she also struggled with him at times; she let him overeat to the point of sickness and did not know how to deal with his tantrums. "[A] child should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree but does not meet the child's need for a parent." (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.)

At bottom, Mother did not establish that her relationship with K.H. was so beneficial as to overcome the preference for adoption. The court did not err in declining to apply the parental bond exception.

DISPOSITION

The orders denying Mother's section 388 petition and terminating Mother's and Father's parental rights are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MENETREZ
J.

We concur:

MCKINSTER
Acting, P. J.

SLOUGH
J.